WASHINGTON STATE COURT OF APPEALS
DIVISION II

No. 46653-8-II

Appeal from Thurston County Superior Court
No. 12-2-01866-6

KRISTINE J. BRUMFIELD, Appellant

v.

PAUL TRAUSE, Commissioner
BRUCE DEMPSEY, Deputy Assistant Commissioner,
DEPARTMENT OF EMPLOYMENT SECURITY of the State of Washington, and
STATE OF WASHINGTON, Respondents

APPELLANT'S REPLY BRIEF

P/m 5/23

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I. ARGUMENTS STATE HAS IGNORED

State's Respondent Brief ('RB') was allowed under RAP 10.4(b) to be 50 pages, yet it is only 36 pages long. It therefore appears to Appellant that since the State cannot argue time or space restrictions for failure to use up the full 50 pages on this factually intensive appeal, State's refusal to address several critical arguments, as highlighted below, was for the typical tactical reason of leaving alone arguments that cannot be defeated.

1. State's failure to make conclusive argument

In Appellant's Brief ('AB'), *Zamora v. Mobil Oil Corp., 104 Wn.2d 199, 208-09 (1985)* was cited for the proposition that the party moving for motion for summary judgment ('MSJ') must meet the highest burden of establishing their factual case with absolutely certainty ('irrefutability'). Although Respondent's Brief ('RB') makes many factual allegations, it never conclusively establishes the minimal facts necessary for it to defeat Appellant's case. This failure to make conclusive argument will be highlighted in this brief when Appellant reaches those arguments from the State.

2. State does not deny Appellant met her burden of production.

Appellant argued that as summary judgment non-movant, she was only required to meet a burden of production, not *persuasion*. AB at 17, citing

Barker v. Advanced Silicon Materials. State nowhere argues that Plaintiff failed her burden of production, so reversal for jury trial is appropriate.

3. State nowhere addresses *Shaw v. Housing Authority*

Appellant argued under *Shaw v. Housing Authority, 880 P. 2d 1006. 75 Wn. App. 755 (1994)* that because the timing between State's perception of her as whistleblower, and its adverse reaction was less than the time surrounding those two points in *Shaw, supra*, the timing alone suggests retaliatory motive justifying jury trial. AB at 20. State wholly avoids discussing *Shaw*. *Shaw* is particularly relevant since the appeal court reversed and allowed for jury trial on the matter of pretext *despite her employer alleging Shaw's history of improper work behavior* (Shaw, 75 Wn. App. at 757) just like State alleges now against Appellant.

4. State nowhere addresses *Vasquez v. State*

Appellant argued under *Vasquez v. State* that her never having received poor work evaluations in 12 years until after State perceived her to be a whistle blower, enhances the argument from close timing based on *Shaw, supra.* AB at 21, citing *Vasquez, supra.* State is totally silent on the subject of such enhancement.

5. State leaves RCW 42.40 020(10)(a)(ii) unaddressed

State at RB 12-13 complains that Appellant never actually filed a whistleblower complaint, but says nothing about Appellant's argument

that under RCW 42.40 020(10)(a)(ii), State's *perceiving* her to be a whistleblower after her July 27, 2009 email announcing her whistleblowing activity to Respondent, makes her legally equal to, and to enjoy all statutory benefits of, those who actually do file a whistleblower complaint. AB at 6-7.

6. State never addresses its failure to meet RCW 42.40.050(2)

Appellant explained that because the "documented series of personnel problems" allowed to the employer under RCW 42.40.050(2) are allowed for the purpose of overcoming the presumption of retaliation, those problems must rise individually or collectively to the level of justifying the behavior Appellant says was retaliatory. AB 7-8. The State never explains why the actions of Appellant which State now cites as "documented series of personnel problems" did not cause her to endure a prior termination or discipline, and a reasonable jury could find that those 'problems' never caused such discipline because State didn't start thinking they deserved discipline *until after it discovered Appellant was a whistleblower* (i.e., State changed its mind for retaliatory purposes).

State's own position is that its pre-disciplinary reassigning her to work out of her home was not disciplinary in nature. RB at 14.

7. State never addresses RCW 42.40.050(1)(a)(iv)

The State asserts that mere reassignment to home was not retaliatory; however, this is contradicted by the above-cited statute, which says "Refusal to assign meaningful work" qualifies as retaliation. State admits "Ms. Brumfield spent but two days on home assignment before her resignation took effect" (RB at 14). During that time, she did not perform any meaningful work because she was never assigned any work, period, for those two days.

8. State avoids dealing with Appellant's explicit prohibitions against them entering her home.

Appellant argued from State's transcript of her deposition that State entered her home despite her unequivocal requirement, **stated several times**, that they refrain from entering unless they first secured a search warrant. AB at 12-13. "I remember telling him [Dempsey] *several times* that he needed to get a search warrant and he refused." (Id at 13). State talks much about actions of Appellant which it says shows implied consent to enter her home (RB at 26), but never attempts to deal with her *unequivocal* and multiple demands that they first secure a search warrant. A reasonable jury could find, due to a) the multiplicity of these unequivocal denials of permission to enter her home, b)Dempsey following Appellant to her home by choice and not by invitation, CP 33:5,

c) Appellant's expressed belief at the time to her union representative that this following her home was "not right" (Id, 33-34), d) Appellant's demand that Dempsey first get a search warrant before entering her home (CP 34:7), e) her testimony that she did not "allow" Dempsey to follow her home, he simply chose on his own to follow her home (id, 34:10), "I them I didn't want them in my home" (id, 34:19), and "I kept telling them no" (CP 36:11), that State's entry into her home, despite her protesting, was invasion of privacy.

9. State avoids discussing its unauthorized file-deletions.

Appellant asserted in her statement of facts that while Defendant was in her home ostensibly to delete the singular Access Database file from her email and computer, they also deleted "other emails having nothing to do with this database". AB at 1-2, citing CP 138:18). She also argued that the singular Access Database file in question was the *solitary* concern of the State as expressed in the written 'Interim Agreement', whose operative phrase was "Employment Security Department with access to her home computer file finds..." (AB at 23, citing CP 136:20). This was referring to Exhibit 12 of Appellant's Opposition to MSJ. See CP 297. That document neither expresses nor implies any concern of the State over any files beyond the Access Database file which is designated "home computer file", supra. Since State neither confirms nor denies having

deleted (during its time in Appellant's home) more files than just the Access Database, Appellant's testimony to these unauthorized unexpected deletions of other files and emails (she testifies that the deletion during State's time in her home wiped out her entire email "inbox" including emails unrelated to the database issue, CP at 37:18-25) would, if believed by the jury, prove invasion of privacy *even if all her other arguments for this tort had failed.* It is a jury question because her testimony to these additional unauthorized deletions depends on her credibility, and the Court at summary judgment cannot determine witness credibility:

> ...the rule is settled that "[tlhe court does not weigh credibility in deciding a motion for summary judgment."
>
> AB at 48, citing Jones v. State, Dept. of Health, 242 P.3d 825 (2010) citing 4A Karl B. Tegland, Washington Practice

10. State nowhere addresses *Campbell v. State*

Appellant's brief at 36-39 argued that the State's discovery objections that she found unacceptable, were the same discovery objections State made in *Campbell v. State, No. C08-0983-JCC. (W.D., March 5, 2009),* which were found unconvincing by the federal Court for the Western District of Washington. (Campbell is citable under GR 14.1(b), see FRAP 32.1, cf. *Carver v. Lehman, 550 F. 3d 883, 893 (9th Cir, 2008))*

State nowhere addresses the obvious problem of a federal judge in Washington State finding unacceptable, in another case, the exact same

discovery objections State made in the instant case. Here, silence is truly golden.

11. State nowhere attempts to refute Appellant's contention that the early spoliation of her evidence was in violation of several Washington Administrative Codes ('WAC')

Appellant argued that State's spoliation of her evidence was so early after her termination that it was in violation of several WACs. AB at 47, citing to WAC 44-14-03005 and ESD Records Policy No. 0005. State completely avoids the problem of it having violated these statutes by its quick spoliation of evidence, and chooses to argue solely that Appellant did not specify the content or relevance of the allegedly destroyed evidence, a false argument refuted later in this brief.

12. State avoids *Rice v. Offshore, 272 p.3d 865, 874 (2012)*

The Rice court found significant the failure of moving party to get first-hand facts from Rice's immediate supervisor:

> "Although Davis's testimony suggests FCA representative Pugh was displeased with Rice's conduct at the fire, the record contains no declaration or deposition testimony from Pugh".
>
> Rice v. Offshore Systems, 272 p.3d 865, 874 (2012)

Appellant therefore argued (AB at 24) that this appeal Court should follow *Rice* and likewise find significant State's failure in the instant case to obtain a Declaration from Appellant's immediate supervisor Pat Seigler (whom Dempsey admits was her immediate supervisor, CP 109, par. 4). If

Offshore's failure to obtain an immediate supervisor declaration justified reversal in that case, State's failure to obtain a declaration from Appellant's immediate supervisor justifies reversal in this case.

13. Appellant argued that her first possession of the Access database was not sufficiently serious to qualify as the single egregious event of RCW 42.40.050(2), State is silent on this

Appellant argued that the State's relaxed procrastinating attitude in getting the database back from Appellant the *second* time she possessed it (due to error of State records Clerk Robert Page in fulfilling her public records requests), refutes State's argument that her *first* possession of it was some profoundly 'urgent' problem qualifying as "single egregious event" under RCW 42.40.050(2). AB 8-9. Although the word "egregious" in connection to this statute appears several times in the RB, State nowhere in the RB attempts to distinguish Page's error of sending this database outside State control, with Appellant's act of sending said database outside State control. It thus appears from State's relaxed attitude toward her second possession of the database, that State's "urgent" reaction to her first possession of it was not sincere but mere exaggeration and pretext in effort to get rid of her for whistleblowing. A final proof that State was creating mere pretext with its sense of "urgency" toward Appellant's first possession of that database, is its own comments. State's

Reply in support of MSJ, CP 323 at 7-11, says possession of the database was worthy of discipline *despite absence of mens rea* (intent to do wrong). If that is true, then the State needs to explain why it never disciplined Robert Page for committing the exact same error. The jury could reasonably believe that State's failure to discipline Page signifies State's true belief that Appellant's prior identical act of sending the database outside State control was not worthy of discipline either, so that its contentions otherwise are mere pretext. This certainly qualifies as the 'circumstantial evidence of pretext' allowed in case law. AB at 18, quoting *Renz v. Spokane Eye Clinic.*

II. SPOLIATION

1. Appellant *did* identify the content and relevance of evidence the State destroyed

Where the spoliation issue was decided through summary judgment, the court's review is *de novo. Tavai v. Walmart Stores, Inc., 307 P.3d 811, 817 (2013).* A party may be responsible for spoliation if it had a duty to preserve the evidence, even if it did not destroy evidence in bad faith. *Henderson v. Tyrrell, 80 Wn. App. 592, 610 (1996).* By noting that mere disregard can be sufficient, the *Henderson* opinion suggests that spoliation encompasses a broad range of acts beyond those that are purely intentional or done in bad faith. *Henderson, 80 Wash. App. at 605, 910 P.2d 522.* **It**

is possible, therefore, that a party may be responsible for spoliation without a finding of bad faith. Case law does not support the State's argument that the complaining party must specify the content and actual relevance of the allegedly destroyed evidence to the case. It rather holds that the destroyed evidence need only have been "potentially" relevant, for spoliation analysis to be invoked: In deciding whether to apply a favorable inference or rebuttable presumption in spoliation cases, the trial court considers the **potential** importance or relevance of the missing evidence and the culpability or fault of the adverse party. *Henderson, 80 Wash. App. at 609.* Appellant/Plaintiff argued that:

> Plaintiff then proved that within 4 days after being involuntarily discharged she specifically requested the State to preserve all files on her work computer **for purposes of the litigation she intended to file**, AB at 47

Appellant's exhibits to her Opposition to MSJ made perfectly clear that the State knew, before it destroyed the records, that Appellant had requested her work computer records be preserved **for purposes of litigation**. From the long list of specified evidence she demanded preservation of:

> "the documentation of all the meetings Pat Seigler had with all staff and managers regarding myself and leading to the illegal constructive discharge, and extortion to sign temporary resignation paper."
> CP 207

Such description easily fulfills the "potentiality" requirement in *Henderson*, supra, no need to specify content or actual relevance. Appellant also specified:

> "Documentation of information I missed as Judy Devoe and Bruce Dempsey were striking deals behind my back as Judy Devoe kept telling me to leave the room very rudely and telling me to shut up so I couldn't talk." Id.

A jury could find Appellant credible, that Devoe and Dempsey did these things, and therefore, created working conditions sufficiently intolerable (by refusing to allow Appellant to give input at critical stages of the resignation process) that the tort of constructive discharge is proved. RB at 23. A better reason to feel compelled to resign could not be imagined than one's union rep and one's boss conspiring to prevent employee from giving say in their own resignation deal...except perhaps Appellant's employer coming into her home and deleting from her computer certain emails and files that it had no authority to delete. Generally, the evidence on Appellant's work computer, which was destroyed after State anticipated litigation from her, contained her direct replies to the alleged "problems" listed by State in MSJ Exhibit B; CP 52-55. Appellant sufficiently specified to the State the content and relevance of the destroyed records, when she asked the state to preserve "all records relevant to this lawsuit", CP 141:10 (MSJ Opposition Declaration, p. 2, par. 4). Where a party controls evidence and fails to preserve it without

satisfactory explanation, the only inference the finder of fact may draw is that such evidence would be unfavorable to that party. *Pier 67, Inc. v. King County, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977).* State's destruction of these sufficiently specified lawsuit-relevant files *so quickly that it violated statutory waiting periods in the WAC and State's retention policy* (AB at 47, citing to WAC 44-14-03005 and ESD Records Policy No. 0005) could easily be believed by a jury to indicate bad faith destruction, **but even if not, a party can be culpable for spoliation *without* a finding of bad faith.** *Henderson v. Tyrrell, 80 Wn. App. At 610 (1996), supra.* Finally, case law is also clear that in weighing the importance of evidence, a trial court considers whether the party was afforded adequate opportunity to examine the evidence. *Henderson, 80 Wn. App. at 607.* The State destroyed Appellant's work computer files after it had anticipated litigation from her and after she requested that the files be preserved for litigation, and the destruction occurred so early it was in violation of State policies on electronic file retention. The quickness of this destruction should have made it clear that the answer to the question on whether Appellant had adequate opportunity to examine the evidence, is a resounding "no, Appellant was *not* afforded an opportunity to examine the evidence", since it was destroyed before she could begin incorporating it into her legal arguments.

III. MOTION TO STRIKE

1. The parties agree the trial court *denied* motion to strike

Appellant drops her former argument that the trial court failed to rule on her motion to strike (AB at 36) and now concedes that Respondent correctly asserts (RB 29) that the trial court *denied* her motion to strike, and therefore, this Court can review *de novo* the trial court's denial of a summary judgment non-movant's motion to strike. *Rice v. Offshore Systems, Inc., 272 P. 3d 865, 870 (2012),* citing *Momah v. Bharti, 144 Wash.App. 731, 749, 182 P.3d 455 (2008).*

2. State fails to rebut the need to strike RCW 42.40 from MSJ

Appellant argued that because the only legal authority for defense cited in State's answer to discovery requests was RCW 49.60, it was by State's own discovery failure that RCW 42.40 became "immaterial" to its defenses (CR 12(f), cited in AB at 40), and therefore, the trial court should have granted her motion to strike from the MSJ all references to and arguments based on RCW 42.40. AB at 33-35. Although State convinced the trial court to deny the motion to strike RCW 42.40 from the MSJ, with the argument that State's discovery answer (limited to RCW 49.60) was "entirely adequate" (CP 320:17), **State now changes tack, and, conveniently too late for Appellant to benefit from the truth, concedes for the first time on appeal that its failure to designate 42.40 in its**

discovery answers was "admittedly error". CP 31, fn. 16. However, State tries to argue lack of prejudice to Appellant thereby, on the basis of two lies. The first lie asserts that Appellant cannot claim prejudice from this discovery violation because there was "ample time" between the April 2014 filing of MSJ and the trial court's August 2014 granting of it, for Appellant to ascertain State's legal defenses. RB at 32. This is a lie because discovery cut-off occurred March 14, 2014, one month prior to the filing of the MSJ. There is no "ample time" to conduct discovery *after discovery is closed.* The second lie says that Appellant "chose to do no affirmative discovery beyond propounding a single set of interrogatories". RB at 35. State's failure to make conclusive argument, but Appellant would have to go outside the record to prove State's dishonesty. The Court should exercise its own authority to supplement the record so that it doesn't allow the State to benefit from its dishonesty, The last time Division Two tried to come up with a way to blame the requesting party for the answering party's discovery violations, it was reversed by the Supreme Court:

> Magaña was entitled to the discovery he requested...Magaña need not have continually requested more discovery and updates on existing requests.
>
> Magana v. Hyundai Motor Am., 220 P.3d 191, 199-200 (2009).

Appellant asserted prejudice based on State's failure to disclose RCW 42.40 in discovery. AB at 33-35. Appellant is *pro se*, which is an even

greater reason to find that she cannot be presumed to somehow divine the legal authorities State planned to argue its defense under, which it refused to disclose in discovery. Had the trial court granted Appellant's motion to strike from MSJ all argument based on and references to RCW 42.40, State would have failed, entirely, to meet its statutory obligation to overcome the presumption of whistleblower retaliation.

----this is the subject of her current appeal motion*

3. State fails to rebut prejudice from its discovery violations

Appellant's Interrogatory # 20 sought State's facts upon which it would premise its affirmative defenses. AB at 37, citing *Campbell v. State*. State now replies that this interrogatory was genuinely objectionable and resurrects the objections it made to the trial court. RB at 32-33. Unfortunately, State remains silent with respect to Appellant's argument that a federal judge in the western district of Washington found State's identical objections unconvincing in the *Campbell* case. AB at 36-37. Appellant thus takes State's refusal to deal with *Campbell,* as an admission that *Campbell* cannot be distinguished, and therefore, its reasoning is persuasive even if not binding, and thus this state Appeal court cannot go wrong in following *Campbell's* reasoning. The Appeal Court should regard State's objections to this Interrogatory No. 20 as using of the *letter* of discovery rules to ignore their spirit, the attitude so

stoutly resisted by the State Supreme Court. AB at 42, quoting *In Re Firestorm (1991).* Furthermore, Appellant cited *Cedell v. Farmers* (2013) for the proposition that the holding in State's cited authority *Weber v. Biddell (1967)* (i.e., that it is improper to ask for evidence upon which the other party intends to rely to prove a fact) is no longer the law (AB at 39), yet State is curiously silent toward that argument as well. State had an obligation to disclose in discovery, it did not, and under *Magana, supra*, the resulting prejudice to Appellant cannot be harmless error or blamed on Appellant for asking only once. The prejudice is real and the fault the State, alone. Had the trial court granted Appellant's motion to strike from the MSJ all references to discoverable facts which State previously improperly failed to disclose during discovery, the MSJ would have endured catastrophic failure (State's prior discovery answers disclosed absolutely nothing that it used in its later MSJ) and jury trial would have been inevitable.

4. Hearsay of Roper and Dempsey.

Appellant argued that she had personal knowledge of the missing tax credits and corruption of the database that allowed for cronyism. AB at 31-32. Because State repeats now in its RB what it asserted in its MSJ Reply brief, namely, that the hearsay within the MSJ affidavits of these two men was *not* being used to prove the truth of the matters asserted (RB

at 30, repeating what it stated in its MSJ Reply brief, CP 320:6), then Appellant Brumfield's allegations of missing tax credits and a corrupted Access Database permitting cronyism, have gone wholly unrebutted by other first-hand testimony, and if this Court reverses, a jury instruction that her allegations to these matters are true would be justified. AB at 31-32, quoting *Hill v. BCTI Income Fund.*

IV. WHISTLEBLOWER CLAIM

1. State knew it had no cause to threaten termination

State admits that involuntary termination occurs where employee resigns due to termination grounds asserted by employer *which employer should have known could not be proved.* RB at 18, citing *Molsness v. City of Walla Walla.* State's own computer tech, Josh Swenson, who while in her home deleted the database at issue from Appellant's computer and email, said it had been previously "sent" from Appellant's personal email address to supervisor Roper in January 2009 (CP 125:11). Drawing all reasonable inferences in a light most favorable to Appellant, what Appellant "sent" was thus "received" by Roper *in January 2009*, which means Roper and thus State knew in January 2009 that Appellant had placed the database outside state control (the email to Roper was from Appellant's personal email account, not her work email). Therefore, State's choice to delay its allegedly urgent concern for more than 5 months

(i.e., "the investigation was completed on August 19, 2009", CP 87:25), shows inaction by the State wholly inconsistent with its story of great urgency, which urgency a jury could reasonably interpret as mere pretext. The Court cannot determine witness credibility at summary judgment (AB at 48, citing *Jones v. State, Dept. of Health, 242 P.3d 825 (2010))*, therefore Roper's assertion that he never received this database attachment from Appellant (CP 105, par. 13 ff) is a credibility issue that must be decided by the jury. Roper offers his "suspicion" as to why he didn't receive that database, but this is speculation, and State agrees that "Speculation, even if set forth in affidavits or declarations, is not competent evidence" at summary judgment (RB at 18, citing *Chen v. State*).

V. WRONGFUL TERMINATION

1. Appellant's attempt to withdraw her resignation took place *before* the effective date of her resignation

Appellant argued on the basis of *Micone v. Town of Steilacoom* that her attempt to withdraw her resignation created a jury question on whether her resignation was voluntary. AB at 14-15. State replies that *Scharf*, citied in *Micone*, required the attempt to occur *before* the effective date, therefore, concludes the State, the *Micone* court must have agreed with that specific detail in *Scharf*. RB at 21 citing *Scharf v. Dept' of Air Force*.

State's legal opinion is dubious at best, but even assuming it is correct, Appellant's attempted withdrawal occurred before the effective date of her resignation. The effective date of Appellant's resignation was not "September 1, 2009", but more specifically, **5 p.m.** on that date. See RB at 7-8, citing Appellant's resignation letter, CP 62. However, an email to State from her union representative Judy Devoe says Appellant has informed Devoe that Appellant wishes to withdraw her resignation, and that email is dated **11:55 a.m.,** September 1, 2009, and therefore there is competent evidence in the record that Appellant had properly attempted (through her union representative) to withdraw her resignation *more than 3 hours before the 5 p.m. September 1, 2009 effective date.* Thus a jury question is raised, by authority of *Micone, supra*, on whether this timely attempt to withdraw resignation, refused by Dempsey (CP 113, par. 25) rendered her resignation involuntary, or to use Micone's language, "vitiate[d] the element of voluntariness." *Micone, 44 Wn. App. At 642.*

2. Appellant's duress was caused by State's deception

State argues that only the duress resulting from a deceptive act by the State in pressuring her to resign, would open the door to constructive discharge. RB at 24. If so, then that cause of action must surely be applicable, since it was previously argued in this brief that State's "urgent" reaction toward her first possession of the database is proven to be a

pretextual exaggeration in light of the State's procrastinating and relaxed attitude toward her second possession of that database by error of State records Clerk Robert Page. A jury could reasonably find that Appellant's first possession of the database, though errant, was not anything "egregious", therefore State's reacting as if they believed it egregious (Dempsey calls it a "shocking breach of public trust", CP at 110, par. 8) constituted deception on the part of the State for the purpose of increasing the duress or pressure on Appellant to resign.

INVASION OF PRIVACY

1. **State invaded Appellant's privacy by deleting, during their time in her home, more files than the parties agreed to deletion of, independently proving invasion of privacy.**

Even assuming, arguendo, that Appellant voluntarily allowed State to enter her home, which she did not, Appellant also testified that State, while in her home, deleted more files from her computer than just the Access Database which the Interim Agreement said was to be the sole object of State's concern in accessing her computer (CP 297, cf. AB at 23, citing CP at 136:20) and therefore these extra unauthorized deletions, which State for obvious reasons never comments on, constitute material facts (deleting files while inside somebody's home, when the written contract governing that state of affairs never authorized such deletions,

cannot be anything less than invasion of privacy) which turn on party-credibility, and thus present matters within the province of the jury, not the Court. AB at 48, quoting *Jones v. State, Dept. of Health, 242 P.3d 825 (2010).*

2. Parol evidence showing parties' intended meaning of the contractual phrase "with access to her home computer file" creates a jury question

Appellant concedes that Washington's parol evidence rule allows the Court to look at evidence outside the contract (here, the written interim agreement) to "determine the contracting parties' intent" (AB at 11, quoting *Brogan & Anensen LLC v. Lamphiear*), but she also insists that because the disputed phrase "with access to her home computer file" does not express or imply whether Appellant consented to State accessing that file *from within her home*, State's attempt to make it mean this by referring to extrinsic or parol evidence outside of the written contract, was an attempt to use parol evidence to "add to" the meaning of this operative phrase a sense that it does not carry, a use of parol evidence explicitly forbidden in case law. *Brogan & Anensen, supra.* In short, allowing someone access to your 'home computer file' does not assert whether you allowed them access to your 'home', anymore than allowing someone to access your 'car stereo' necessarily implies you were agreeing to let them

into your 'car', since in fact car stereos are known to exist outside of cars. State now tries to overcome its abuse of the parol evidence rule by citing the New York case of *Wood v. Duff-Gordon, 222 v. 88, 89, (1917)*. RB at 28. First, that case is not even 'persuasive' since Washington state's rule forbidding parol evidence to be used to modify contractual language is well-settled, not need to invoke non-Washington authorities. Second, Respondent State appears to be misusing this New York case, since the Washington Supreme Court clarified in 2013, in a case citing *Duff*, that in Washington state, contractual obligations will not be *implied* absent some legal necessity to do so, such as failure of due consideration:

> Courts will also not imply obligations into contracts, absent legal necessity typically resulting from inadequate consideration.
>
> Condon v. Condon, 298 P. 3d 86, 92 (2013) citing Oliver v. Flow Int'l Corp., 137 Wash.App. 655, 662, 155 P.3d 140 (2006) (citing as support Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917)

State has already committed itself to the premise that there was adequate consideration in the resignation contract between the parties:

> In contractual terms, the Plaintiff received consideration in exchange for her resignation and cooperation.
>
> RB at 17, citing Burns v. City of Seattle

Therefore, Duff is distinguishable. Even if this Court believed the operative phrase "with access to her home computer" implied consent to let State enter Appellant's *house*, this is far from certain, as it was argued earlier that Appellant unequivocally objected, *several times*, to State

entering her home without a search warrant. AB at 12-13. "I remember telling him [Dempsey] several times that he needed to get a search warrant and he refused." Where there are competing inferences that may be drawn from the evidence, the issue must be resolved by the trier of fact. *Johnson v. UBAR, LLC, 150 Wn. App. 533, 537, 210 P.3d 1021 (2009).* Since State could have accessed this "home computer file" by Appellant bringing her home computer to work and allowing State to perform the access and deletions from that neutral location (AB at 23), reasonable jurors could disagree on what exactly the parties intended to be meant by the controlling phrase "with access to her home computer". The fact that State entered her home *despite her multiple unequivocal refusals to consent to their entry* raises the jury question of whether their entry to her home was gained by coercion. So when case law says subsequent acts of the parties may also be considered in determining the intent of the parties. *Hastings v. Continental Food Sales, Inc., 60 Wn.2d 820, 376 P.2d 436 (1962),* the subsequent acts of Appellant in unequivocally forbidding State to enter her home, qualify as the "subsequent acts" which the State, for obvious reasons, wishes the Court to ignore. Finally, summary judgment law requires the words in the Interim Agreement be construed in a light most favorable to Appellant, who is non-movant at summary judgment: AB at 15, (emphasis added), quoting *Herron v. King Broad. Co., 776 P.2d*

98 (1989). Contract language is to be interpreted most strongly against the party who drafted the contract, in this case, the State. *Guy Stickney, Inc. v. Underwood, 67 Wn.2d 824, 827, 410 P.2d 7 (1966).* For example, the phrase "possession date" was considered by the Supreme Court as capable of more than one reasonable interpretation, sufficiently that it reversed summary judgment and remanded for jury trial on the meaning of that term. *Brogan & Anensen LLC v. Lamphiear, 202 P. 3d 960 (2009).*

VI. CONCLUSION

State's Respondent Brief is fatally plagued by failure to address multiple critical arguments, and by failure of the rebuttal arguments it chose to make. The Court should reverse and remand for jury trial on all causes of action, granting all relief requested in Appellant's Opening Brief.

Dated this 21st day of May, 2015

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Affidavit of Service

Washington State Court of Appeals, Division II
Brumfield v. State, et al,.
No. 46653-8-II

I, Christian Doscher, not a party to this action, being over the age of 18 years, competent to testify, and with personal knowledge of the following, hereby affirm:

On, May 26, 2015, I served Appellant's Reply Brief in the above-captioned case on Respondent State, as follows:

Time of Service: 1:54 p.m.

Manner of Service: I handed a true and correct paper copy of Appellant's Reply Brief to the receptionist at the Attorney General's Office, located at 7141 Cleanwater Drive SW Tumwater, WA 98501. She asked how they were to be routed, and I told her to forward them to Matthew Kuehn, counsel for Respondent State in this matter, in the "torts division".

I affirm that the foregoing is true and correct to the best of my knowledge.

Dated this 26th day of May, 2015

Christian Doscher
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Tumwater, WA. 98501
360-339-3257